# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1942

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## No. 999

CITY AND COUNTY OF SAN FRANCISCO (a municipal corporation), *Petitioner,*

vs.

DAN E. WILLIAMS and LYDIA C. WILLIAMS (his wife), DOMINGO DE BERNARDI, FRED (his wife), DOMINGO DE BERNARDI, FRED C. MUNN (his wife), THE OLIVER-HARRIMAN MINING COMPANY, LTD. (a corporation), CLYDE PENROSE and IRENE S. PENROSE (his wife), LOUIS HARRIS, MARY L. MILLS, formerly M. L. Maxwell, HELEN C. STRATTON, PETER M. SHAW, RAY HOUSTON, NORMAN HOUSTON, HELEN M. STEWART and D. M. STEWART, JR. (husband and wife), LOVINA C. MARCONI, EVERIL G. POORMAN, formerly Everil G. Marconi, *Respondents.*

## PETITION FOR WRIT OF CERTIORARI

**to the District Court of Appeal, First Appellate District, Division One, of the State of California**

**and**

**BRIEF IN SUPPORT THEREOF.**

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vs.

DAN E. WILLIAMS and LYDIA C. WILLIAMS (his wife), DOMINGO DE BERNARDI, FRED DE BERNARDI, JOHN F. MUNN and MARY C. MUNN (his wife), THE OLIVER-HARRIMAN MINING COMPANY, LTD. (a corporation), CLYDE PENROSE and IRENE S. PENROSE (his wife), LOUIS HARRIS, MARY L. MILLS, formerly M. L. Maxwell, HELEN C. STRATTON, PETER M. SHAW, RAY HOUSTON, NORMAN HOUSTON, HELEN M. STEWART and D. M. STEWART, JR. (husband and wife), LOVINA C. MARCONI, EVERIL G. POORMAN, formerly Everil G. Marconi, *Respondents.*

## PETITION FOR WRIT OF CERTIORARI

**to the District Court of Appeal, First Appellate District, Division One, of the State of California**

(NOTE): Unless otherwise noted, italics in excerpts throughout this petition and attached brief are ours.

*To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:*

Comes now the petitioner above named and respectfully prays that a writ of certiorari issue to review the judgment of the District Court of Appeal,* First Appellate District, Division One, of the State of California, entered December 28, 1942, in the case, Dan E. Williams et al., Plaintiffs and Respondents, vs. City and County of San Francisco (a municipal corporation), Defendant and Appellant. (56 A.C.A. 421, 133 P(2d) 70.) (R. 126.)

A petition by defendant and appellant (this petitioner) for a hearing by the Supreme Court of California, after said judgment by said First District Court, was denied on February 25, 1943. (R. 132.)

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**SUMMARY STATEMENT OF THE CASE.**

In this statement petitioner herein is referred to as "defendant", and respondents herein are referred to as "plaintiffs". The plaintiffs in this case are owners of land alleged to be riparian to the Tuolumne River on a stretch of that stream in the vicinity of Jacksonville, Tuolumne County, California, and immediately upstream from the Don Pedro Reservoir of Modesto Irrigation District and Turlock Irrigation District. They sought to quiet their titles as riparian owners,

*Hereinafter, in this petition and attached brief, referred to as "First District Court".

and to enjoin defendant from diverting water of the Tuolumne River through its Hetch Hetchy Aqueduct for use in San Francisco.

After the amended answer was filed in this case, this Court decided the case of *California Oregon Power Co. v. Beaver Portland Cement Co.*,* 295 U. S. 142, 79 L. ed. 1356, and held therein that plaintiff had no riparian rights as his homestead patent of 1885 was issued subsequent to the passage of the Desert Land Act of March 3, 1877, which reserved the riparian rights incident to public lands. Defendant (petitioner herein) then moved for judgment on the pleadings and asked the trial Court to take judicial notice of records showing that plaintiffs' lands (with the exception of the Clio Mill site) were located or entered subsequent to March 3, 1877.

Relying upon the decision of this Court in the *Cal. Ore. Power* case, the trial Court granted defendant's motion. Plaintiffs appealed and the judgment was reversed by the District Court of Appeal of the Third District. (*Williams v. San Francisco,* 24 Cal. App. (2d) 630, 76 P.(2d) 182.) Thereafter, a petition by defendant to have the appeal heard by the Supreme Court of California was denied. (24 Cal. App. (2d) 639.)

At the trial of this case on the merits a dismissal was granted as to plaintiff Harris and the Clio Mill Site, and the trial Court found that all of the parcels

*Hereinafter throughout this petition and attached brief, this case is referred to as the "Cal. Ore. Power case".

of the remaining plaintiffs were located or entered *subsequent* to March 3, 1877, but nevertheless held that plaintiffs' lands possessed riparian rights.

In their complaint, plaintiffs alleged that they had continuous ownership along the Tuolumne River from the uppermost parcel to the lowermost parcel described in the complaint, and that this continuity adapted their lands for use as power projects. They outlined several of such projects at the trial. The trial Court, however, held that the continuity of their ownership was broken at certain places. It held that no one of the several power projects proposed by plaintiffs is "feasible, practicable, or profitable" and that, therefore, "said plaintiffs, and each of them, have failed, at the present time, to show that they can put the water to a beneficial use." (Finding XXIV, R. 102.) Regarding these power projects the trial Court reserved jurisdiction as follows:

> "That the plaintiffs have not shown that they can as yet put such riparian rights to a beneficial use and jurisdiction is hereby reserved in this court to modify this judgment permitting the use of the waters of the Tuolumne River and its tributaries by the plaintiffs when upon application and notice by plaintiffs, or any of them, showing is made that they can put such waters to beneficial use." (R. 111.)

**THE JUDGMENT OF THE FIRST DISTRICT COURT IS FINAL AS TO THE POINT RAISED HEREIN.**

The point for which we contend in this petition and attached brief is that the California State Courts are bound by the decision of this Court in the *Cal. Ore. Power* case and must hold that lands patented after March 3, 1877 have *no* riparian rights. After a trial on the merits, the trial Court has held that such lands *do* have riparian rights, the First District Court has affirmed that judgment, and the California Supreme Court has denied a petition for hearing. It is certain, therefore, that the judgment of the trial Court on this point *is now final.* The interlocutory part of the judgment runs *only* to the combination of the individual parcels of plaintiffs in a power project, and does not detract from the finality of the judgment as to the riparian rights of the individual parcels.

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**STATEMENT DISCLOSING BASIS OF JURISDICTION.**

We contend that this case comes directly under subdivision 5 (a) of Rule 38 of this Court, as the First District Court has decided a federal question in a way not in accord with an applicable decision of this Court, in that it has refused to accept the interpretation of the Congressional Desert Land Act of March 3, 1877, adopted by this Court in the *Cal. Ore. Power* case. In that case, this Court in construing the Desert Land Act held that the land of plaintiff physically riparian to Rogue River in Oregon possessed no riparian rights as it had been patented in

1885—subsequent to the passage of the Desert Land Act.

The First District Court has held that the lands of respondents herein possess riparian rights even though said lands were entered or located subsequent to March 3, 1877.

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**THE QUESTION PRESENTED.**

The sole question presented is the federal question as to the interpretation of a congressional statute, the Desert Land Act of March 3, 1877. The state Court has erroneously interpreted the decision of this Court in the *Cal. Ore. Power* case.

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**REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.**

The California Supreme Court in *San Joaquin etc. Co. v. Worswick,* 187 Cal. 674, 690, 203 P. 999, 1006, held that the reservation of water in the Desert Land Act applied to *desert land entries* only. In the *Cal. Ore. Power* case, this Court held that the reservation applies to patents issued under *any of the land laws* of the United States, and that to accept the view of the California Supreme Court in the *Worswick* case *"would, in large measure, be to subvert the policy* which Congress had in mind—namely, to further the disposition and settlement of the public domain." (295 U. S. 161.) No reference is made to the *Worswick* case in the opinion of the First District Court. In thus ignoring that case, it not only fails

to accept a principle established by the Supreme Court of California, but also refuses to recognize the ruling of this Court as to the erroneous theory of the *Worswick* case.

*It is elemental that the construction of grants by the United States is a Federal not a State question, and that the States are powerless to place any limitation or restriction on the control* by the United States of the disposition of its lands.

*United States v. Oregon,* 295 U. S. 1, 27, 79 L. ed. 1267, 1280.

*The legal significance of the ruling of the First District Court in this case is that Congress cannot reserve riparian rights in disposing of public lands.*

The question is of controlling importance in the States of California, Washington, North Dakota and South Dakota, which four States and Oregon are the only ones, enumerated in the Desert Land Act, in which the riparian right is recognized. This Court has held that no lands in Oregon patented after March 3, 1877, have riparian rights, but the First District Court has refused to follow this Court as to lands in California. Under its theory, its erroneous interpretation would apply in Washington, North Dakota and South Dakota. It requires no argument to establish the point that the riparian doctrine is a material impediment in the way of the full and successful operation of the doctrine of appropriation, under which the great water projects in the Western States have been constructed. The opinion of this Court in the *Cal. Ore. Power* case is a forcible demonstration of this point.

Wherefore, petitioner respectfully prays that this petition be granted.

Dated, San Francisco, California,
April 26, 1943.

Respectfully submitted,

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*Attorneys for Petitioner.*

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CERTIFICATE OF COUNSEL.

I, John J. O'Toole, do hereby certify that I am an attorney and counsellor of the Supreme Court of the United States and am one of the attorneys for the petitioner named in the foregoing petition for writ of certiorari; that the allegations of said petition are true as I verily believe; that the points raised therein are in my opinion meritorious; and that said petition is not filed for the purpose of delay.

Dated, San Francisco, California,
April 26, 1943.

JOHN J. O'TOOLE,
*Of Counsel for Petitioner.*